

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

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UNITED STATES COURT OF APPEALS

For The Second Circuit

United States of America,

Plaintiff-Appellee,

by Dorothy S. Greenberg,
for herself as well as for the United States of America,

Plaintiff-Relator-Appellant,

-against-

The Burmah Oil Company, Limited, Burmah Oil Incorporated, Burmah Oil Tankers Limited, Bethel Marine, Inc., Southhold Marine, Inc., Vermont Marine, Inc., Burmast East Shipping Corp., Burmah Gas Transportation Limited, Elias J. Kulukundis, Summitt Marine Operations, Inc., Summitt I, Inc., Summitt II, Inc., Summitt III, Inc., Cherokee I Shipping Corporation, Cherokee II Shipping Corporation, Cherokee III Shipping Corporation, Cherokee IV Shipping Corporation, Cherokee V Shipping Corporation, Energy Transportation Corporation, C. Y. Chen, Joseph J. Cuneo, Jerome Shelby, Cryogenic Energy Transport, Inc., LNG Transport Inc., Liquegas Transport Inc., James Durbin, John C. Bullitt, First National City Bank, Citicorp Leasing, Inc., General American Transportation Corp., General Dynamics Corporation, Citimarlease (Burmah I), Inc., Citimarlease (Burmah LNG Carrier), Inc., Citimarlease (Burmah Liquegas), Inc. and Citicorp.,

Defendants-Appellees.

BRIEF OF DEFENDANTS-APPELLEES

PRELIMINARY STATEMENT

Plaintiff-relator-appellant Dorothy S. Greenberg seeks, inter alia, to recover a substantial bounty under the False Claims Act in exchange for providing the Government with copies of certain documents -- some public, some apparently purloined* -- which allegedly show that the defendants conspired to defraud the United States. Contrary to Ms. Greenberg's strenuous representations, however, the information contained therein was not new. Not only did the Government have almost all of the actual documents tendered by Ms. Greenberg in its possession at the time she filed suit, but its already substantial knowledge of all the information underlying her complaint had been widely reported in the press and had already prompted investigations by several executive agencies, a legislative committee and the General Accounting Office.

Relator's real claim is that, in spite of the fact that the Government had all of the information upon which her complaint is based and was already investigating the charges therein, her rush to the courthouse entitles her to assume the role of a private attorney general and prosecute the suit

* Relator never actually explains how she came to possess the documents tendered -- documents in which she has no apparent interest. She merely offers the carefully parsed explanation that her evidence "apparently emanates from the files of Burmah and its representatives". (Relator's Brief at 46, n. ("R.Br."))

herself -- for a generous reward, of course.* However, such private prosecutions, based upon evidence or information already in the hands of the Government, are neither within the intent of the False Claims Act nor within the function of an already overburdened judiciary. As Judge Knapp wrote in his decision below:

"The [False Claims] Act was designed to encourage citizens to come forward with information of which the Government might be ignorant. It was not designed to permit citizens to call upon the courts to supervise the manner in which the Government deals with information it already has."
(A-578)

We submit that the District Court correctly dismissed this complaint for lack of subject matter jurisdiction pursuant to 31 U.S.C. § 232(C). That decision should be affirmed.

* Had Ms. Greenberg waited, she would have learned that, after a thorough investigation by both the Civil and Criminal Divisions of the Department of Justice which was coordinated by the United States Attorney for the Southern District of New York, no facts were found to substantiate the allegations of fraud and other illegal activity contained in her complaint. (See discussion at p. 11, n. and Annex A, infra.)

COUNTERSTATEMENT OF THE CASE

Despite the attempts to make this appear to be a complicated case,* the issue presented for decision by this Court can be simply stated, viz., whether the District Court was correct in finding that the action was based on evidence or information within the possession of the Government at the time it was commenced.

A. The Applicable Statute

The complaint, filed on September 30, 1976, purports to state a claim under the False Claims Act, 31 U.S.C. §§ 231 et seq. (the "Act"). The Act provides, inter alia, that persons making or aiding in the making of false claims against the United States shall forfeit to the United States the sum of \$2,000 and double the amount of damage sustained by reason of the false claim. (§ 231) It also provides that actions to recover such monies may be brought by any person on behalf of the United States and that such persons may share in the proceeds of recovery or the settlement of such actions up to 25% thereof. (§ 232(B), (E)) Upon commencing such a suit on behalf of the United States, the statute requires the private suitor to serve the Attorney General with, inter alia:

* For example, relator has named 35 parties as defendants. For purposes of this appeal, it is sufficient to state that all of the defendants are connected in some manner with the construction, financing or ultimate use of the subject liquefied natural gas tankers (the "LNG tankers").

"a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit." (§ 232(C))

The United States then has sixty days after the required service in which to appear and, at its option, carry on the suit. (§ 232(C))

Jurisdiction of actions under the Act is vested in the district courts of the United States (§ 232(A)); provided, however, that a court shall have no jurisdiction to proceed with any such suit

"whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agent, officer or employee thereof at the time such suit was commenced. . . ." (§ 232(C)) (emphasis added)

B. The Complaint

The essential allegation contained in the 23-page complaint is that the defendants participated or knowingly aided and abetted in a conspiracy to defraud the United States by requesting certain subsidies and loan guarantees in connection with the construction of liquefied natural gas tankers. Specifically, plaintiff alleges that several of the defendants applied to the Maritime Administration ("MarAd") for construction differential subsidies ("CDS") pursuant to

Title V of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1151 et seq. (1970), and for ship mortgage guarantees pursuant to Title XI of the Merchant Marine Act of 1936, 46 U.S.C. §§ 1271 et seq. (1970)* CDS payments attempt to equalize the difference in construction costs between a ship constructed in a foreign shipyard and the same ship constructed in a United States shipyard. Such payments are intended to promote United States foreign commerce by encouraging the growth and maintenance of both the United States merchant marine and the United States shipbuilding industry. See 46 U.S.C. § 1151(a); S. Rep. No. 838, 82d Cong., 1st Sess., reprinted in [1951] U.S. Code Cong. & Adm. News 2335-43 (1951). Similarly, the primary purpose of Title XI loan guarantees is to promote the private financing of a modern United States merchant marine fleet. See H.R. Rep. No. 2450 83d Cong., 2d Sess., reprinted in [1954] U.S. Code Cong. & Adm. News 4012-15 (1954).

* Contrary to relator's characterization (R.Br. at 12), Title XI of the Merchant Marine Act authorizes the Secretary of Commerce to guarantee obligations issued, inter alia, to finance the construction of eligible vessels, not to make loans. For this reason, although it is not necessary for the Court to reach the issue, it is clear that insofar as the complaint purports to allege violations of Title XI, it fails even to state a claim for relief under the False Claims Act. An application for the issuance of a guarantee is simply not a "claim" on the United States within the meaning of the False Claims Act. United States v. McNinch, 356 U.S. 595 (1958).

Thus, both of these programs are available only to United States citizens within the meaning of the Shipping Act, 1916, as amended. 46 U.S.C. § 1274(a), 46 U.S.C. § 1151(c). According to Ms. Greenberg, the applications for CDS and Title XI guarantees which several of the defendants filed were fraudulent in that they falsely represented that the relevant parties were United States citizens.

However, contrary to relator's allegations that the various applications somehow obscured the true nature of the transactions involved (e.g., R.Br. at 12-13), those applications, as amended from time to time, in fact contained detailed and precise descriptions of each transaction, the parties involved and their respective roles therein (e.g., A-280-383).^{*} The financial arrangements are of the type generally referred to as

* Relator complains of two separate transactions. The first (the "Cryogenic transaction") involves the construction of three vessels (the "Cryogenic vessels") to be used in transporting LNG from Algeria to the United States. Applications under Title V and Title XI relating to the Cryogenic vessels (the "Cryogenic applications") were filed in 1972 and acted upon in 1974. The second transaction (the "Cherokee transaction") involves the construction of vessels (the "Cherokee vessels") to be used in transporting LNG from Indonesia to Japan. Applications under Title XI relating to the Cherokee vessels (the "Cherokee applications") were filed in 1973 and 1974 and approved in 1977, almost four months after relator commenced this action. See Annex A.

It is noteworthy that the so-called Kurrus Memorandum (A-47-49) on which Ms. Greenberg places such great emphasis, deals entirely with the Cherokee transaction, as to which she fails to state a claim in any event under the holding of the Supreme Court in United States v. McNinch, supra (see discussion at p. 5 n., supra), since the Cherokee transaction involves only the issuance of guarantees and not the advancement of any monies.

leverage lease transactions, a common form of financing for ships, airplanes, railroad cars and other pieces of equipment. (A-267) The applications identified each of the relevant parties and set forth as to each in abundant detail; inter alia, its form of organization and citizenship, its business, its controlling shareholders, its officers and directors and their prior business affiliations. (E.g., A-288-298, 309-314, 347-355.) In addition, the proposed vessels, the cost of constructing them, and their planned uses were described. (E.g., A-282-287, 299-300, 361-363.) Finally, a chronological description of the various steps in the transaction was provided including, inter alia, the sources of financing at various stages of the transaction, security interests which were to be granted in the vessels, pledges of stock or loan guarantees with respect thereto, the roles of the various participants at each stage and the ownership of the vessels throughout. (E.g., A-283-286, 300-302, 356-360.) All of these items were fully supported by the extensive exhibits attached to each application. (E.g., A-303-304, 363-367.)

Appended to her complaint, Ms. Greenberg tendered nine specific documents and a compilation of news clippings, listed in Schedule A thereto (A-28-29), which she claims indicate that by filing the Cryogenic and Cherokee applications,

the defendants made false claims against the United States. Realator contends that the documents contain evidence or information supporting the alleged false claim which was not in the Government's possession at the time she filed suit. This is simply not the fact, as was pointed out to the Court below by the United States Attorney for the Southern District of New York.

C. The Government's Motion to Dismiss

On December 1, 1976, the United States Attorney entered a special appearance in this case on behalf of the Government. At that time, he moved to dismiss the complaint pursuant to section 232(C) of the Act on the ground that relator's action "was based upon evidence or information in the possession of the United States of [an] agency, officer or employee thereof at the time such suit was brought. . . ."* (A-263 et seq.) The Government's moving papers detailed the numerous investigations into the question of compliance with the citizenship requirements of the Shipping Act which had been commenced by various executive agencies and congressional committees prior to the filing of the present

* By Notice of Motion dated December 6, 1976, defendants-appellees also moved to dismiss the complaint for lack of subject matter jurisdiction and joined in the Government's motion.

action and the extensive underlying data in the Government's possession upon which such investigations were based. The Government also noted the abundant contemporaneous press coverage of those allegations and events. Of particular significance were articles appearing in the August 19 and 21, 1976 editions of The New York Times (A-158-161) wherein the transactions in question were described in great detail and several documents tendered by Ms. Greenberg as a basis for this action were specifically identified and quoted.*

* For example, the August 19 article begins:

"The Securities and Exchange Commission, the Federal Maritime Administration and at least one Congressional committee are investigating whether the Burmah Oil Company, a major British concern, illegally received commitments for Federal guarantees or subsidies to build at least eight huge tanker ships in this country. . . .

* * *

"At issue is whether the ships have any right to American subsidies or loan guarantees, since Burmah is not an American company. Federal law specifies that only domestic concerns can receive such Government backing." (A-158)

That article also identified the Memorandum from Kurrus to McMullen (Item 2, A-47-49) and, in describing it, stated:

"Mr. Kurrus quoted Mr. Blackwell as saying that he was aware that problems had arisen over the Title XI financing and that 'everyone recognized' that the formal arrangement approved by the Maritime Administration 'was based on friction (sic).'" (A-159)

The Government's papers in support of its motion to dismiss confirm that as early as 1974, Senator Byrd of West Virginia and various White House officials received inquiries as to whether the citizenship requirements of the Shipping Act had been complied with and referred the information to the Office of Legal Counsel of the Department of Justice.* (A-277) MarAd, acting on information from a variety of sources, initiated an investigation into the alleged violations of citizenship requirements in the transactions (A-489) and was questioned by Congressman Les Aspin on the same topic in early 1976. (A-489) Congressman Aspin also initiated an investigation by the House Committee on Government Operations (A-223, 278, 491, 524), the Chairman of which in turn requested an additional inquiry by the General Accounting Office. (A-222, 278, 522) In addition, the Securities and Exchange Commission issued an order directing a private investigation into, inter alia, the financial aspects of the overall transactions and had already issued documentary subpoenas prior to the commencement of this action. (A-501) Finally, by letter dated August 19, 1976, Congressman Aspin brought the New York Times article of that date to the

* The favorable opinion of the Office of Legal Counsel to the Justice Department is annexed as Exhibit 14 to the Affidavit of Samuel Nemirow, General Counsel for the Maritime Administration. (A-481)

attention of the Attorney General and the Department of Justice began its own investigation which was still in progress at the time the Government sought dismissal of the instant complaint (A-496, 497).*

* On January 19, 1977, Secretary of Commerce Richardson announced that the Maritime Administration had, with his full knowledge and approval, made a final commitment to provide Title XI guarantees with respect to the so-called Cherokee I through Cherokee V applications. (A-497) In an official release announcing this decision, the Secretary stated:

"These loan guarantees are being extended after a thorough analysis by the Maritime Administration of the economic soundness of the overall project and of the legal qualifications of the applicant."

* * *

"The contentions regarding improper citizenship and control in the case of these vessels have been the subject of an extensive investigation by the Department of Justice. This investigation was coordinated by the United States Attorney for the Southern District of New York, and involved staff of both the Civil and Criminal Divisions of the Department of Justice in Washington. On the basis of this investigation, the U.S. Attorney for the Southern District of New York wrote the General Counsel of the Maritime Administration on January 17, 1977 and stated:

"... we have concluded that the facts of which we are aware do not justify the initiation of criminal or civil proceedings for violation of the citizenship requirements or the False Claims Act."

A copy of this Release is reproduced as Annex A herein. This Court may take judicial notice thereof pursuant to Rule 201(f), Fed.R.Evid.

In deciding the Government's motion, Judge Knapp clearly gave relator the benefit of every doubt. For example, he assumed, for purposes of the motion, that the one arguably relevant document tendered by relator which was not in the possession of the Government prior to commencement of this action contained substantial information.* (A-577) Similarly, Judge Knapp accepted, for purposes of the motion, Ms. Greenberg's naked charge of complicity in the alleged fraud on the part of the Maritime Administration and disregarded the evidence and information possessed by that agency in determining whether, in fact, the jurisdictional requisites of section 232(C) were met.**

Nevertheless, Judge Knapp found that the essential information upon which the present suit is based was in the possession of, inter alia, the Department of Justice and the House Committee on Government Operations and, thus, in the possession of the United States prior to the commencement of this action.

* Not to be deterred by the Government's possession of the documents originally annexed to her complaint, upon the argument of the Government's motion, relator's counsel produced yet another mysteriously-acquired but substantively irrelevant document (which, in any event, contained no new information) to the Court in a vain attempt to comply with the jurisdictional prerequisite of the statute. (A-551) Such tardy proffering of material by a private suitor is completely outside the scope of section 232 of the Act. As such, it was properly disregarded by the District Court and deserves similar treatment in this Court.

** As will be discussed infra at 25, n., Judge Knapp's adoption of plaintiff's charge and his resulting disregard of information in MarAd's possession was unnecessary and, indeed, overly generous both as a matter of fact and as a matter of law.

We submit that the decision appealed from is eminently correct. Reports in the press and, indeed, Ms. Greenberg's own papers show various executive offices and agencies and a legislative committee investigating and focusing on allegations concerning the granting of subsidies and loan guarantees to alleged non-citizens in contravention of the statute. While these investigations were continuing, relator rushed to the courthouse and filed the present action based on those same allegations. She now seeks judicial sanction to maintain her bounty hunt in spite of the Government's prior knowledge and its ultimate decision, premised on a full investigation, that no basis for suit exists. On appeal, she attempts to justify her self-proclaimed role as a private attorney general only by a dubious claim of original authorship of the complaint and the disclosure of but one document which the Government did not physically possess at the moment she filed suit -- a document which had already been specifically identified and quoted in pertinent part in the press.* While the statute speaks in terms of

* The one document on which plaintiff premises her entire appeal, e.g., R.Br. at 27 and Points I and II, is the so-called "Kurrus Memorandum", a three-page Memorandum dated May 12, 1975 from Richard J. Kurrus, a Burmah attorney, to John J. McMullen, then-President of Burmah Tankers. (A-47-49) The Kurrus Memorandum is one of the documents which The New York Times identified and quoted from some six weeks before plaintiff filed suit.

evidence or information in the possession of the United States prior to commencement of suit, relator speaks rather in terms of one isolated document.

In her lengthy, contorted arguments, both before this Court and before the District Court, relator studiously ignores both the letter and the spirit of the False Claims Act. Rather than awakening a sleeping and oblivious Government to new evidence or information concerning fraudulent claims, she is attempting to dictate to, inter alia, the Department of Justice, the Department of Commerce, the Securities and Exchange Commission and the Congress how and when to do their respective jobs. We submit that the District Court correctly refused to aid her in this exercise.

ARGUMENT

I

IT IS NOT NECESSARY THAT THE GOVERNMENT PREVIOUSLY HAVE POSSESSED EVERY DOCUMENT SUPPLIED TO IT BY THE QUI TAM PLAINTIFF FOR SUBJECT MATTER JURISDICTION TO BE LACKING

It is apparently relator's underlying position (see Points III and V of her brief) that, because the Government did not possess each and every document which she supplied to it in connection with the institution of this suit -- viz., the Kurrus Memorandum of May 12, 1975 (A-47-49) (see p. 13, n., supra), see R. Br. at 27-28 and Points I and II -- the District Court erred in dismissing her complaint for want of subject matter jurisdiction. This formalistic contention finds no support in the clear language of the statute. Section 232(C) provides that jurisdiction is lacking whenever the Government had prior possession of the evidence or information of the qui tam plaintiff and, as is discussed infra at II and III, the Government did effectively possess the information contained in the Kurrus Memorandum. Moreover, regardless of the Government's possession of this memorandum vel non, it is clear from both the language and logic of the Act and from the decisional law thereunder that there is no requirement that the Government be in possession of every single shred of evidence or information which can be supplied by the qui tam plaintiff, but only such evidence or information as would be "essential" in order for the Government to have brought the claim sued upon by the relator.

Nowhere in section 232(C) is it suggested that the evidence or information must include every particular item which the qui tam plaintiff may be able to supply. On the contrary, the one exception to the jurisdictional abatement provision of section 232(C) clearly indicates that the standard to be used for determining jurisdictional capacity is the "substantiality" of any new evidence or information provided by the would be relator:

"[N]o abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice." (§ 232(C)) (emphasis added)

This standard has been specifically recognized in the case law. In United States v. Aster, 176 F.Supp. 208 (E.D. Pa. 1959), the District Court dismissed the action on jurisdictional grounds upon a determination that "the essential information upon which the present suit is predicated was supplied to and was in the possession of the United States before this suit was filed." (176 F.Supp. at 209; emphasis added) In affirming this decision at 275 F.2d 281 (3d Cir. 1960), the Court of Appeals for the Third Circuit made specific reference to the fact that the lower court's decision was

based on a standard of "essential information." (275 F.2d at 282)

The same standard was more recently reaffirmed in United States ex rel. Vance v. Westinghouse Electric Corp., 363 F.Supp. 1038 (W.D. Pa. 1973), where the court held:

"[T]he absolute language of the [False Claims] act controls . . . and suits by informers are barred where the essential information upon which they are based is already in the hands of the government regardless of the government's source of information." (363 F.Supp. at 1042)

Accord, United States ex rel. McLaughlin v. American Chain & Cable Co., 62 F.Supp. 302, 303 (S.D.N.Y. 1945) (qui tam action dismissed on basis of finding that all "material information" was previously in the possession of the Government).

Such a standard is consistent with the legislative intent. The purpose of the qui tam provision of the False Claims Act is to promote the rectification of false claims about which the Government has no knowledge and, conversely, the purpose of the jurisdictional abatement provision is to prevent the institution of "parasitical" actions by parties utilizing public information as the basis of their suits. See discussions of legislative history of the False Claims Act in

United States v. Rippetoe, 178 F.2d 735, 736-37 (4th Cir. 1949); United States ex rel. Bayarsky v. Brooks, 154 F.2d 344, 345-46 (3d Cir. 1946); United States v. Pittman, 151 F.2d 851, 853 (5th Cir. 1945); United States ex rel. Vance v. Westinghouse Electric Corp., supra, 363 F.Supp. at 1042; United States v. Armour & Co., 146 F.Supp. 546, 549-50 (D.D.C. 1956), aff'd, 254 F.2d 90 (D.C. Cir. 1958); United States ex rel. Sherr v. Anaconda Wire & Cable Co., 57 F.Supp. 106, 107-08 (S.D.N.Y. 1944), aff'd, 149 F.2d 680 (2d Cir. 1945). To hold that despite the fact that the Government was fully aware of the allegations underlying a qui tam suit, a relator may defeat the jurisdictional abatement provision on the technicality that a single document in her possession was not previously in the Government's -- as relator herein admits to be attempting* -- would be to defeat the avowed legislative intention to restrict utilization of the qui tam procedure.

* Although relator claims to have supplied other "new" documents to the Government (R. Br. at 6, 33), she makes no effort to establish that such documents are relevant -- let alone essential -- to her suit. Nor, in fact, could she, as these documents (items 7, 8(a) and 8(b) of Schedule A to relator's complaint; A-229-262) are concerned only with internal political problems of Burmah and, for the most part, involve Burmah transactions other than the financing of the LNG tankers. See ¶ 36 of the Nemirow Affidavit (A-276-277). Moreover, these documents are summarized in the proposed New York state court complaint of Burmah (which is item 5(a) of Schedule A to relator's complaint; A-125-143), and which was in the possession of both MarAd and the Government Operations Committee prior to the institution of the present action.

In short, it is clear that an "essential" evidence or information standard is mandated under section 232(C) -- a standard which relator has fallen far short of in the present case. Not only was the Government in possession of full documentation concerning the subsidies and loan guarantees (see Nemirow Affidavit (A-264-279)), but it was well aware of the allegations that they may have been procured on the basis of fraudulent representations as to the citizenship of the applicants. See R. Br. at 22-37. This awareness was particularly highlighted by the repeated inquiries of Congressman Aspin commencing on March 3, 1976 and by the investigation of the House Committee on Government Operations which had, among the items in its possession prior to the commencement of this suit, a lengthy memorandum detailing these very allegations.*

* This 70-page "Memorandum of Law" (A-55-124), (the "September 16 Kurrus and Jacobi Memorandum"), prepared for Burmah Oil Tankers Limited by the firm of Kurrus and Jacobi and dated September 16, 1975, is item 4 in Schedule A to the Complaint. The memorandum, which was written at a point in time when Burmah and the Energy companies were on the verge of litigation (A-144-154), contains a lengthy factual and legal analysis of both the Cryogenic and Cherokee transactions. As is explained in Point II and set forth in tabular form in Annex B, with the addition of incidental publicly-available information, relator's entire complaint is virtually plagiarized from this document. The September 16 Kurrus and Jacobi Memorandum was concededly in the possession of the House Committee on Government Operations prior to the commencement of this suit (A-494-495) and was also shown to MarAd's General Counsel one year prior to any action by Ms. Greenberg. (A-274).

II

RELATOR HAS NOT SUPPLIED ANY
NEW EVIDENCE OR INFORMATION

In any event, no new evidence or information was presented to the Department of Justice with the filing of the complaint herein.* Indeed, the only point made in relator's labored discussion of the Kurrus Memorandum and the report thereof in The New York Times is the claim that the Government did not previously have knowledge of what has been characterized on appeal as the alleged complicity of MarAd and Administrator Blackwell in the actions complained of (R. Br. at 27-28).** Even that point appears to have been recently concocted by relator.

In her complaint, relator merely alleges that MarAd personnel "closed their eyes" to the reality of the transaction. She states:

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- * For the Court's convenience, Annex B hereto is a tabular listing of the documents tendered by relator with her complaint and the agency of the United States possessing the evidence or information contained therein at the time suit was commenced.
- ** Any assertion by relator that the Kurrus Memorandum contained theretofore unknown information about Energy's role in the Cherokee transaction deserves but short reply for those allegations had previously been fully revealed in a variety of sources. MarAd's awareness of the allegations relating to Energy is demonstrated in what relator has seen fit to characterize as Administrator Blackwell's "private correspondence of May 1, 1975". (R.Br. at 57) (A-480) (emphasis added) In addition, the House Committee on Government Operations already had the September 16, 1975 Kurrus and Jacobi Memorandum which discusses the role of Energy at length. (A-74-75, 80-83, 85-104) That Committee also had a complaint filed by Burmah against Energy in the New York State Supreme Court containing the same allegations. (Item 5(b) to Schedule A to the Complaint, A-144-154).

"The MarAd Administration, or at least some of its personnel, have closed their eyes to the realities of the arrangements and have permitted the defendants to proceed as alleged herein, and they have in the past permitted other foreign citizens to wrongfully benefit from C.D.S. Financing and Title XI Financing, directly or indirectly." (Complt. ¶ 38, A-21).

In his affidavit in opposition to the Government's motion below, relator's attorney casually asserts that Administrator Blackwell "is involved in the alleged subterfuge" (A-511) and that "[o]ne can only conjecture as to how MarAd concluded" that the citizenship requirements had been satisfied. (A-515)

On appeal, however, these unsupported conjectures are completely transformed. Suddenly, the principal disclosure relied on by relator as the basis for this action is that of the alleged complicity of MarAd and Administrator Blackwell (e.g., R.Br. at 29, 32), neither of whom, we note, is among the thirty-five defendants herein. Indeed, relator even misquotes her own dubious sources in attempting to reinforce her recently-concocted position. In her brief, relator states:

"The principal omission [in the Times' description of the Kurrus Memorandum] is Blackwell's suggestion that Burmah engage in a cover up, i.e., Blackwell 'warned about a full fledged legal controversy between Burmah and Energy,' which would lead to exposure of the wrongdoing." (R.Br at 29) (emphasis added)

The actual document, however dubious its history, does not state that Mr. Blackwell "warned" about such a controversy in the conspiratorial manner implied by relator but states merely that he was concerned about the theory of the transaction. As it appears in the Joint Appendix, that document states:

"He [Administrator Blackwell] said that he recognized that weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy."
(A-49)

Relator is clearly grasping at recently-fabricated straws.

A. Relator Has Not Disclosed
Any Evidence or Information

Assuming nonetheless that relator intended to make some kind of disclosure relating to MarAd's participation in a false claim, her copious quotation from the Kurrus Memorandum raises the initial question of whether its contents even rise to the level of "information or evidence" indicating such complicity. A more reasonable (and responsible) reading of this memorandum discloses that it is little more than a report, by Mr. Kurrus, of a position which he was advocating to MarAd.

For example, relator quotes what she considers to be the "relevant portion of the Kurrus Memorandum", (R. Br. at

29) an account by Kurrus of a meeting with Administrator Blackwell. Kurrus states:

"I explained that the real probelm [sic] vis a vis the Energy people arose because of the special legal problems concerning the Title XI financing and that everyone recognized that the structure that MarAd had approved in this deal (and in other similar deals such as Maritime Fruit Carriers, Ultramar, Shell, A.J. Chandris, etc.) was based on a fiction." (R. Br. at 31 (A-49)) (emphasis added)

* * *

"I explained that we obviously were not interested in provoking such a legal battle if it could reasonably be avoided, but the way that this deal is presently structured is an unviable and impossible situation for Burmah." (R. Br. at 31 (A-49)) (emphasis added)

* * *

"Furthermore, there is a valid argument I believe that the Energy people would be permitted to profit unduly and unconscionably through a United States Government contract." (R. Br. at 31-32 (A-49)) (emphasis added)

On their face, these are the conclusory allegations of an obviously interested advocate, not the hard facts envisioned by Congress when it passed a statute requiring "evidence or information".

Similarly, Administrator Blackwell's alleged responses to Kurrus' explanations and beliefs do not provide any factual support for the proposition that MarAd participated in a fraud. Instead of portraying the co-conspirator discerned by relator, the remarks attributed to Mr. Blackwell merely evidence the concern of a responsible government official that the Cherokee transaction be based on sound economic and legal theories. According to Kurrus, Administrator Blackwell stated, inter alia:

"He [Administrator Blackwell] said that he recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy." (R. Br. at 31 (A-49)) (emphasis added)

* * *

"Mr. Blackwell admitted that there appears to be several things basically wrong with the overall structure of this deal that should be rectified if possible. He agreed that Burmah must take its own actions to place this deal on a sound legal as well as economically feasible basis." (R. Br. at 32 (A-49)) (emphasis added)

Assuming arguendo that Administrator Blackwell made precisely the remarks attributed to him by Mr. Kurrus, they are hardly sufficient to be considered "evidence or

information" of MarAd's complicity in an alleged fraud.*

* Even less should the Kurrus Memorandum be viewed as any "evidence or information" of a false claim being made on the Government since, at most, it deals with MarAd's attitude, that is, its alleged complicity, and not with the substance of the alleged claim that was actually made on the Government in the form of the Cryogenic and Cherokee applications, as amended. Thus, at most, the Kurrus Memorandum serves only to disqualify MarAd for purposes of imputing knowledge to the Government and has no independent probative significance. Judge Knapp so disqualified MarAd, arguendo, and yet still found, correctly, that other branches of the Government had all the essential evidence or information provided by Ms. Greenberg. (A-576-77)

Moreover, a strong argument can be made that Judge Knapp reacted overgenerously in accepting, even for purposes of argument, relator's contention regarding MarAd. MarAd's alleged actions (or, more properly, alleged inaction, Compl. ¶ 38, A-21), even if established, scarcely constitute the degree of participation contemplated by relator's cited authorities regarding "non-imputation", which involved Government personnel charged with fraudulent participation (United States v. Rippetoe, supra) and having interests adverse to principals (Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969)). As noted in Matanuska Valley Bank v. Arnold, 116 F.Supp. 32 at 36 (D. Alaska 1953), mod. on other grounds, 223 F.2d 778 (9th Cir. 1955):

"In order to avoid the imputed knowledge rule, the agent's interest must be so adverse to that of his principal as to virtually destroy the agency relation."

That was not the case here, nor has relator even alleged as much.

Thus, it is apparent that relator did not provide any evidence or information at all. The subject matter upon which relator relies -- the alleged complicity of Administrator Blackwell and MarAd -- received only passing reference in her complaint and opposition papers to the Government's motion. Moreover, to the extent that allegation was made, even on appeal it only consists of the conjecture and opinion of less than neutral participants. Surely such dubious statements do not rise to the level of evidence or information envisioned by the statute.*

B. Relator Has Disclosed Nothing New

Even assuming that relator's unsupported conjectures can be considered "evidence or information" of MarAd's complicity in a false claim, such allegations were certainly not new to the Government. As noted by Judge Knapp in his opinion, the Kurrus Memorandum upon which relator relies was "specifically identified and fully described in an August [1976] New York Times article [and] [a]s a result, the information it contained was public knowledge. A copy of the article was in the files of the Justice Department." (A-577) In particular, the Times article noted that:

* Indeed, such ipse dixit allegations of complicity on the part of Government officials are but a clever attempt to subvert the jurisdictional requirements for qui tam suits. If relator succeeds in compelling disregard of all evidence or information possessed by the allegedly participating agency or official, such naked allegations will become the norm in all qui tam suits -- a result clearly at odds with the legislative intent behind section 232(C).

"Documents obtained by the Times indicate that officials of the Maritime Administration may have been aware that violations of Federal law might have been committed in connection with the Burmah guarantees and subsidies." (A-499)

In arguing that the Government did not possess the Kurrus Memorandum for purposes of section 232 (C), relator would have us believe that the general publication of a description of a document is somehow insufficient to make the Government aware of the information in question. She has, however, chosen to ignore the plain language of section 232(C)*. That provision deals with both "evidence or information in the possession of the United States" (emphasis added) and the import of the alternative language is manifest: it is not crucial that the Government physically possess the document in question, as long as it has knowledge of the information contained therein. See Point I, supra. As noted, the substance of the Kurrus Memorandum was "fully described" in the New York Times article. Such

* In relying on a document which had previously been identified and quoted from in the press, relator also ignores the legislative intent behind section 232(C). As the District Court noted in United States ex rel. Sherr v. Anaconda Wire & Cable Co., supra:

"The majority report of the Senate Judiciary Committee, which considered the new legislation, refers to the fact that the amendment of the old qui tam statute was sought because of the experiences of the Department of Justice -- 'that many persons who have filed suits and may file suits under this section (3491 Rev.Stat.) have no information or facts of their own, but prepare and file complaints which obviously are based on information and alleged facts obtained bodily from indictments returned in the United States courts, from newspaper stories, and congressional investigations.'" 57 F.Supp. at 107-08 (emphasis added)

publication, we submit, is clearly sufficient for purposes of section 232(C) abatement -- regardless of whether the memorandum itself ultimately could have been acquired.*

The Government also had other information relating to MarAd's alleged complicity long before relator filed suit. The September 16, 1975 Kurrus and Jacobi Memorandum (A-55-124), which was reviewed by MarAd and was in the possession of the House Committee on Government Operations prior to the institution of this suit (R. Br. at 19, 24), also raised the allegation of MarAd's involvement in and responsibility for the acts here complained of (A-122-124). As noted therein, "[t]he problem, in other words, is partly MarAd's as well as Burmah's and MarAd is in this respect quite sensitive to the Frankensteinian [sic] situation that it has created." (A-123-124)

* Relator is too hasty in assuming that the Government could not otherwise have obtained the Kurrus Memorandum (R. Br. at 35). Not only is it possible that the copy of the memorandum held by The New York Times might have been made available, but, in view of the fact that the relator -- who appears to have no connection with the issues of this case -- has herself somehow come into possession of the memorandum, it seems likely that numerous persons without even colorable standing to invoke a privilege against disclosure obtained copies of the memorandum and, as such, could have been compelled to produce it.

Further government concern: as to MarAd's actions in these matters was expressed by Congressman Aspin in his May 25, 1976 letter to Congressman Brooks, Chairman of the House Committee on Government Operations, a copy of which was entered into the Congressional Record (A-490-491) and also sent to the Department of Justice (A-496-497). In commenting on what he considered an inadequate response by MarAd to questions put to it by him concerning the subject transactions, Congressman Aspin stated:

"Regrettably, MarAd's letter to me reveals a too-easy willingness to be 'satisfied' with technical corporate documentation, and insufficient attention to factors bearing on control -- even in the face of my specific request focusing on control.

"I believe it advisable, under the circumstances, that an appropriate congressional scrutiny be brought to bear to assure that the administrative agency involved gives full and thorough consideration to the real issues at stake.

* * *

". . . I do believe that what MarAd has told me is not enough, and in its own way MarAd may feel it has a stake in seeing this project through. I want to know what the facts are in this case. I want to know MarAd's procedures for getting at the essential facts.

"Since this does raise questions as to government agency procedures in situations where the agency is deeply involved, in this instance financially, in the overseas transaction, I believe it is highly desirable that there be a further inquiry on this issue as well." (A-491)

Congressman Aspin also wrote a letter to Secretary of Commerce Richardson dated October 2, 1976 (A-523-529) in which he urged the Secretary to relieve MarAd of final decision-making authority on the financing.* He there stated:

"[MarAd's] highest officials have been portrayed as being deeply involved in this transaction, so that in judging the questions that have been raised they would seem to be judging themselves."
(A-526)

In short, the very limited amount of information which relator claims the Government did not possess by virtue of not having physical possession of the Kurrus Memorandum was, in fact, thoroughly and compendiously described in numerous other documents -- all of which were in the possession of not just MarAd, but various other segments of the Federal Government prior to the institution of this suit. Moreover, since relator did not see fit to make either MarAd or Administrator Blackwell a party to the action and devoted but one fleeting reference to the allegation in her complaint (§ 38, A-21), she should not be heard to claim that the information supplied by her

* As noted, supra, the Secretary of Commerce agreed, "because of the high degree of press and Congressional attention focused on this transaction", to inform himself fully and review the ultimate decision by MarAd. (Annex A)

with respect thereto was "essential" to the bringing of the suit.

C. Relator's Claim of Original Authorship is Wholly Spurious

The only other contribution which relator claims to have made is the alleged original authorship of the complaint herein. Relator suggests in Point III of her brief that the fact that information is "scattered" throughout the Federal Government rather than molded into a uniform whole somehow favors qui tam jurisdiction under section 232(C). This fact, even were it true, is of no greater effect than the fact that the Government has not instigated its own proceeding. Just as section 232(C) is not concerned with specific documents, it is also not concerned with precise organization of its knowledge. As stated above, the statute looks to the Government's awareness of "evidence of information" relating to false claims, and despite relator's strained reading, United States ex rel. Vance v. Westinghouse Electric Corp., supra, is not to the contrary.*

Even if, as relator argues, (R. Br. at 33-37) some requirement of Government comprehension can be grafted on to

* That case, more typical of those arising under the Act, involved the presentation of allegedly inflated or fabricated invoices to the Government. The Court merely held that the Government's possession of the contracts, bills and invoices was not conclusive on the question of Government knowledge of the essential information on which the suit was based, i.e., that the invoices were inflated or fabricated. 363 F.Supp. at 1043.

the statute, it is clearly satisfied in the present case. Congressman Aspin, among others, was aware of and publicized to other government entities not just the existence of certain documents in the Government's files, but that such documents suggested the possibility that false claims -- in the form of fraudulent representations of citizenship -- had been made against the United States. (See, e.g., his letter to Attorney General Levi: "If this information is accurate it surely constitutes prima facie evidence that some parties may be involved in an effort to obtain Title XI guarantees through fraud." (R. Br. at 20-1.) Such possibility was also the subject of the September 16, 1975 Kurrus and Jacobi Memorandum (A-55-124) which was in the Government's possession. Clearly, the raw information held by the Government had already been "synthesized" by various executive and legislative entities long before relator instituted this action. The numerous inquiries which were being conducted at that time, not to mention the detailed coverage thereof in The New York Times, shed at least some doubt on relator's self-proclaimed efforts to coordinate her information into an organized complaint.

Relator's brazen claim of original authorship is perhaps most effectively belied by a simple comparison between

one of her purloined documents and her "laboriously" assembled complaint. (R. Br. at 36) Annex C hereto is a tabular comparison of the allegations of the complaint with the contents of the September 16, 1975 Kurrus and Jacobi Memorandum. That analysis shows that, at best, relator's contribution consisted of supplying the corporate affiliations and addresses of certain defendants, certain jurisdictional allegations and, to a limited degree, updated financial information contained in other publicly-available sources. Viewed less benevolently, relator's much-lauded original complaint is revealed to be a "cut-and-paste" revision of the September 16, 1975 Kurrus and Jacobi Memorandum liberally sprinkled with direct, albeit unattributed, quotes from that document. Such an obviously parasitic, indeed plagiarized, lawsuit is precisely what the jurisdictional abatement portion of the statute seeks to avoid and, we submit, Judge Knapp's Order doing so was correct.

III

INFORMATION NEED NOT BE IN POSSESSION OF
THE JUSTICE DEPARTMENT, AS OPPOSED TO OTHER
SEGMENTS OF THE UNITED STATES GOVERNMENT

Throughout her brief, relator suggests that the information on which a qui tam action is based must be in the possession of the Justice Department, or, at the least, a department in the executive branch of the Federal Government capable of taking legal action to prosecute and redress fraud, for the action to be dismissable under section 232(C) of the Act. Consequently, information which relator admits was in the possession of the Maritime Administration, Congressman Aspin and/or the House Committee on Government Operations, but not in the possession of the Justice Department, does not, she implies, "count" for purposes of seeking jurisdictional abatement. This contention is without merit for two independent reasons.

In the first place, as set forth in Point I, supra, the Government need only be in possession of evidence or information "essential" for it to have brought the claim sued upon -- not all evidence -- for purposes of dismissability,

and the information possessed by the Justice Department clearly was of such nature.* Thus, even were it the case -- which it is not -- that only Justice Department files could be considered, this action would have to be dismissed.

In the second place, evidence in the possession of all branches of the Federal Government must be considered for these purposes. This fact is made clear by the very language of section 232(C):

"The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such was brought. . . ." (emphasis added)

As Judge Knapp noted in his opinion (A-577), there is no authority whatsoever suggesting that the underscored language was intended to be limited so as to apply only to the Justice Department, or indeed, to any one department or branch of the Federal Government. On the contrary, both the legislative history and the case law are unequivocal as to the

* Relator herself notes (R. Br. at 22-23) that the Justice Department had both Congressman Aspin's remarks and the August 19, 1976 New York Times article in its files, either of which would have been sufficient to inform it as to those claims which form the basis of this action. See Kuramai Affidavit (A-496-497).

fact that Government knowledge, in the context of the False Claims Act, is intended to embrace information in the possession of not only all executive agencies but Congress as well. As expressed by one of the House managers of the abatement amendment at 89 Congressional Record 10846 (December 17, 1943) and cited by the court in United States ex rel. Vance v. Westinghouse Electric Corp., supra, 363 F.Supp. at 1042n:

"We feel that by enacting this compromise legislation the United States will be amply protected and at the same time there will not be this ever-present invitation to racketeers to examine indictments, to examine reports of the Truman committee, or if you please, for dishonest and unscrupulous investigators to turn over information to their friends or co-conspirators for the purpose of bringing suit against our citizens on information that either comes to them by reading an indictment or a bill of complaint or through testimony before some committee or which comes to them in their official capacity as a representative of the United States." (emphasis added)

Thus, in United States ex rel. McLaughlin v. American Chain & Cable Co., supra, a qui tam action brought to recover alleged overcharges was dismissed under section 232(C) upon a finding that all "material information" upon which the suit was based, although not entirely in the possession of the Justice Department, was nonetheless in the possession of the Government

by virtue of hearings held by the House Committee on Naval Affairs and a complaint filed by the Federal Trade Commission. Similarly, in United States ex rel. Leslie v. Potomac Electric Power Co., 208 F.2d 39 (D.C. Cir. 1953), a qui tam action charging the making of false claims for electrical services, the Court of Appeals for the District of Columbia affirmed dismissal of the complaint, holding that the essential information "was known to the Government through the District of Columbia Public Utilities Commission, one of its own agencies." (208 F.2d at 40-41) See also United States ex rel. McLaughlin v. Anaconda Wire & Cable Co., supra, 57 F.Supp. at 108.

Therefore, even assuming -- albeit wrongly -- that the Justice Department itself did not have possession of "essential" information to bring the instant action, it is clear that such information was in the possession of Congressman Aspin,* the House Committee on Government Operations and/or the Maritime Administration prior to the institution of this suit and, as shown above, possession by such personnel of the Government is of itself sufficient to support dismissal pursuant to section 232(C).

* The relator seems to feel that Congressman Aspin's attempt to instigate investigations into these financings somehow buttresses her jurisdictional position. The converse, however, is true. As discussed herein, it is Governmental knowledge, not action, which is crucial for jurisdictional abatement.

IV

RELATOR'S ARGUMENT THAT THE
JUSTICE DEPARTMENT DID NOT ACT
TIMELY IS WITHOUT MERIT

Relator claims in Point V of her brief that, by virtue of the fact that the Justice Department failed to enter its appearance until sixty-three days after the institution of this suit, the Government may not now move to dismiss under section 232(C). This argument is entirely without merit and deserves but brief reply.

The sixty day appearance requirement is wholly unrelated to the jurisdictional abatement provision of section 232(C). To the contrary, the latter section specifically provides that suits are dismissible under its terms "whenever it shall be made to appear that such suit was based on evidence or information in the possession of the United States . . . " (emphasis added)

More importantly, the abatement provision is not simply an affirmative defense; satisfaction of its requirements divests a court of subject matter jurisdiction. In the unequivocal language of the statute:

"The Court shall have no jurisdiction to proceed with any suit. . . ." (emphasis added)

Questions as to jurisdiction over subject matter can, of course, be raised at any time in a proceeding, by any party (or by the court). See Rule 12(h)(3) Fed.R.Civ.P. This fact was well recognized in United States ex rel. Vance v. Westinghouse Electric Corp., supra, 363 F.Supp. at 1041, wherein the court held that it was not important whether a motion to dismiss on these grounds was properly brought pursuant to Rule 12(b) or Rule 56 of the Federal Rules. As stated therein:

"It is the opinion of the court, however, that this procedural problem is of no importance. The act in question clearly states in 31 U.S.C. § 232(C) 'The court shall have no jurisdiction to proceed with any such suit brought under clause (B) of this section or pending suit brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States or any agency, officer or employee thereof at the time such suit was brought'. We thus have a question of jurisdiction over the subject matter which can be raised at any time and may even be raised by the court on its own motion." (emphasis in original)

In short, no party to an action under section 232 may be heard to object as to the timeliness of the bringing of a motion to dismiss pursuant to the jurisdictional abatement provision therein.

CONCLUSION

Relator has burdened this Court with an overly long and largely irrelevant brief which fails to counter Judge Knapp's simple conclusion that this case is based on evidence or information which was already in the possession of the United States at the time suit was filed. Relator's attempt to act herein as a qui tam plaintiff flies directly in the face of the purpose of the False Claims Act and the jurisdictional abatement provision thereunder and merits no further indulgence by this or any other Court.

Consequently, for the reasons stated above, as well as those set forth in the Government's papers below and in Judge Knapp's opinion, the Order of the District Court dismissing this action should be affirmed.

Dated: New York, New York
April 22, 1977

Respectfully submitted,

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ANNEX A

ANNEX A

UNITED STATES DEPARTMENT OF
COMMERCE
NEWS

WASHINGTON, D.C. 20230

OFFICE
OF THE
SECRETARY

EMBARGOED FOR RELEASE UNTIL 4:00 P.M. EST, JANUARY 19, 1977

In accordance with a previously announced schedule for decision, Secretary of Commerce Elliot L. Richardson today announced that the Maritime Administration of the Department of Commerce has agreed to guarantee financing for the construction of seven liquefied natural gas (LNG) tankers by the General Dynamics Corporation.

Because these loan guarantees have been the subject of considerable Congressional and press attention, and because of the important public interests involved in the decision to issue the guarantees, Secretary Richardson has prepared the attached explanation of his decision to approve the action of Assistant Secretary for Maritime Affairs, Robert J. Blackwell, in granting these loan guarantees in the amount of approximately \$730 million.

On the advice of the Securities and Exchange Commission, this release is being made after 4:00 p.m., so as to avoid possible trading impact on General Dynamics' securities.

STATEMENT OF SECRETARY OF COMMERCE
ELLIOT L. RICHARDSON
REGARDING APPROVAL BY THE UNITED STATES
MARITIME ADMINISTRATION OF THE
APPLICATION OF GENERAL DYNAMICS CORPORATION
FOR FINANCIAL GUARANTEES FOR
CONSTRUCTION OF LIQUEFIED NATURAL GAS TANKERS,
PURSUANT TO TITLE XI OF THE
MERCHANT MARINE ACT OF 1936, AS AMENDED

Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs has today made a final commitment to provide Federal loan guarantees in the amount of \$474,523,000, to enable construction of five liquefied natural gas (LNG) tankers by General Dynamics Corporation. In addition, he has extended a preliminary and conditional commitment to guarantee loans for the construction by General Dynamics of two additional LNG vessels, in the amount of \$252,600,000.

These commitments have been extended under Title XI of the Merchant Marine Act of 1936, as amended ("Title XI") and represent the largest single commitment of Title XI loan guarantees in the history of this program. These loan guarantees are being extended after a thorough analysis by the Maritime Administration of the economic soundness of the overall project and of the legal qualifications of the applicant. Consistent with the purposes of Title XI, these ships are being built in a U.S. shipyard, will sail under the

U.S. flag and will be manned by U.S. seamen. They will be chartered by General Dynamics to Energy Transportation Corporation, a U.S. tanker operator which in turn will charter them to a subsidiary of Burmah Oil Company, Ltd. ("Burmah"), a British corporation, to carry LNG from Indonesia to Japan.

Because of the important public interests involved in the decision of the Assistant Secretary for Maritime Affairs with regard to these guarantees and because of the high degree of press and Congressional attention focused upon this transaction, I agreed last November in a letter to Congressman Les Aspin that the Department's final action on these guarantees would not be taken without my full knowledge and approval. Accordingly, I have informed myself as fully as possible regarding this matter and Assistant Secretary Blackwell's decision to grant the financial assistance sought by General Dynamics Corporation has been taken with my approval.

The Department's need to make its decision at this time results from the following factors:

- The LNG tankers being built by General Dynamics are to be used to carry LNG from Indonesia to Japan, pursuant to a Transportation Agreement between a Burmah

subsidiary, Burmah Gas Transport, Ltd. and Pertamina, the Indonesian State-owned energy corporation. This Agreement is a principal economic underpinning for the construction of the LNG tankers by General Dynamics.

- The Transportation Agreement, as amended in August of 1976, permits either party to the Agreement to terminate its participation, without penalty, if financing has not been arranged for construction of the charter vessels necessary to transport the LNG, by January 31, 1977. Pertamina is obligated, under a separate agreement, to deliver LNG to Japanese consumers, and it therefore negotiated the January 31, 1977 termination date to allow itself the opportunity to seek alternative means to fulfill its delivery contracts, if it became apparent that the General Dynamics' vessels would not be available in a timely fashion.
- It is the best judgment of the Maritime Administration that Pertamina would exercise its termination option, if it cannot be assured by January 31, 1977 that financing will be available to allow completion of the General Dynamics' vessels.
- If Pertamina were to exercise this option, the completion of construction by General Dynamics of U.S. flag LNG tankers would be placed in substantial jeopardy and this fact, in turn, would cast doubt on General Dynamics' continuing capacity to build additional U.S. flag LNG vessels.
- The scope and complexity of the issues involved in the General Dynamics' application are such that the new Secretary of Commerce could not fairly be expected to reach a decision on this matter prior to the January 31, 1977 termination option date.

On the basis of the above-enumerated considerations, I determined that it was my duty to reach a decision on this matter prior to the change of Administrations. January 19th was picked as the latest feasible date for my decision -- in order to permit the furthest possible progress in various investigations, relevant to our decision, conducted by the Department of Justice and the Securities and Exchange Commission ("SEC").

On December 8, 1976, the new Administration was informed in writing of our proposed timetable for decision and the reasons therefor, and was offered an opportunity to request that the decision be deferred. They declined to comment.

The purpose of this Statement is to address publicly stated concerns regarding these loan guarantees. These concerns include: (i) allegations that the transaction is not structured appropriately to meet certain "citizenship and control" tests contained in the applicable statutes; and (ii) allegations that the eventual "time charterer" of these vessels has engaged in questionable payments practices.

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o Allegations Regarding Citizenship and Control

Numerous contentions have been made that the United States applicants, past and present, for Title XI assistance with regard to the construction of these LNG tankers have not met certain tests of the Maritime statutes which require that applicants be U.S. "citizens," uncontrolled by foreign interests. These contentions have resulted from the intrinsic complexity of the structure of this transaction, including the fact that a foreign corporation, Burmah, is to be the eventual time charterer of the vessels for use in a foreign-to-foreign trade. In addition, the originally intended method of ownership and finance for these vessels, so-called leverage leasing, proved unavailable during 1974-1975 and, as a result, Burmah advanced funds in excess of \$100 million to the U.S. applicants for Title XI financing to allow them to make progress payments on tankers under construction at General Dynamics.

Applicants for Title XI assistance are required to file affidavits that they are U.S. "citizens" uncontrolled by foreign interests. If contrary to such affidavits the citizenship and control tests are not met, an action may lie for civil or criminal fraud. In a civil action, the U.S. Government could seize the vessels. In a criminal

action, the Department of Justice could prosecute the individual or individuals filing the affidavits.

The contentions regarding improper citizenship and control in the case of these vessels have been the subject of an extensive investigation by the Department of Justice. This investigation was coordinated by the United States Attorney for the Southern District of New York, and involved staff of both the Civil and Criminal Divisions of the Department of Justice in Washington. On the basis of this investigation, the U.S. Attorney for the Southern District of New York wrote the General Counsel of the Maritime Administration on January 17, 1977 and stated:

" . . . we have concluded that the facts of which we are aware do not justify the initiation of criminal or civil proceedings for violation of the citizenship requirements or the False Claims Act."

We have received, in addition, new affidavits with regard to citizenship and control from all the parties to the current transaction required by law to be U.S. citizens. On the basis of these affidavits, the Maritime Administration's own legal review, and the Department of Justice's recently completed investigation, it appears not

imprudent to conclude that the guarantees approved today will support a transaction that is lawful and proper under relevant statutory standards.

o Allegations Regarding Improper Payments by Burmah

It has been alleged that a Burmah subsidiary, in negotiating the Transportation Agreement for carriage of LNG from Indonesia to Japan, made "payments" in the form of promises of further participation in the profits of that Agreement to certain undisclosed parties -- including Indonesian Government officials. Also alleged is possible self-dealing by one or more former officers of Burmah subsidiaries. Further, it has been alleged that Burmah has paid a \$3 million "commission" under questionable circumstances to Tongsun Park, a South Korean businessman under investigation by the Department of Justice, and that this "commission" was or is connected to the construction or use of the LNG tankers to be financed by the Title XI guarantees.

These contentions, which are the subject of an ongoing "private but formal" investigation by the SEC, are of substantial concern to me and to the Maritime Administration for the following reasons:

- If these allegations prove true, they could arguably cast doubt upon the soundness of the Transportation Agreement, which is, as already noted, an important economic underpinning for the entire transaction. Similarly, if the allegations are true, there arguably could be enforceable rights in the hands of undisclosed third parties to participate in the profits of the Transportation Agreement.
- Continuing participation of undisclosed and possibly "corrupt" third parties in the profits of a transaction enabled, in part, by the extension of U.S. Governmental, financial guarantees, would contravene strong U.S. public policy against corrupt or questionable payments practices in international commerce.

In reviewing the General Dynamics' application for Title XI assistance, we have been at pains to assure ourselves that: (i) the alleged questionable payments have not and will not jeopardize the economic soundness of the overall transaction and (ii) that no "corrupt" or improper benefits will accrue to undisclosed parties.

To this end, the staff of the Maritime Administration has reviewed all of the materials currently in the possession of the SEC as a result of its ongoing investigation of Burmah. Although we have been informed that Burmah has resisted disclosing certain materials to the SEC on the grounds of lawyer-client privilege, we have sought

and received assurances from Burmah's U.S. counsel that the documents withheld do not contain any additional information with regard to the basic facts relevant to our review.

We have secured from Pertamina's counsel an opinion that Pertamina is legally bound by the Transportation Agreement, as amended in August 1976, and that Pertamina's obligations under this Agreement have received the approval of the Indonesian Government.

We have insisted upon, and have received, an affidavit from Burmah setting forth the steps it has executed to displace allegedly corrupt participation in the profits of the Transportation Agreement by former minority, undisclosed interests in a Burmah subsidiary.

We have received the opinion of Burmah's counsel that the steps taken to displace these minority interests are legally sufficient under relevant common and statutory law, and that these parties have no enforceable remedy against Burmah. Further, we have received an opinion of Burmah's counsel that none of the previous minority interests have a legal remedy which could invalidate the Transportation Agreement. Therefore, we have concluded

that there is no reasonable prospect that these minority interests will be able to perfect a claim to participate in the profits stemming from the Transportation Agreement.

On the basis of the information, affidavits and opinions in hand, we have concluded that the Transportation Agreement, as substantially amended in August of 1976, is not unenforceable or otherwise unviable. Also, we have assured ourselves to the fullest extent possible that allegedly corrupt minority interests have been eliminated from participation in any profits from this transaction.

With regard to the Tongsun Park "commission," we have satisfied ourselves, by a thorough review of the information currently in the hands of the SEC, that the commission did not relate to the applications for Title XI financing for the LNG tankers in question. The commission was paid in connection with a negotiation between Burmah and Japan Lines for the cancellation of certain charters of oil "supertankers" for which Burmah had no cargo. These charters were causing Burmah to lose \$750,000 per week and gave Burmah an overall financial exposure in excess of \$150 million. It is true that Mr. Park and his partner discussed with Burmah the possibility of

negotiating alternative means to structure Burmah's participation in the Indonesia-Japan LNG transaction. However, these discussions ended without result. While recent news accounts indicate that Mr. Park may have sought a role in this transaction, on behalf of a competing shipowner, we have no evidence which would lead us to believe that Mr. Park has or will profit in any way from the transaction for which Title XI loan guarantees have today been approved.

Finally, a question has been raised whether it is appropriate for the Federal Government to extend substantial financial guarantees in a situation where, an indirect, but important beneficiary of such guarantees -- Burmah -- has been alleged to have engaged in questionable or corrupt practices in international commercial dealings.

As the former Chairman of President Ford's Task Force on Questionable Corporate Payments Abroad, I have given these concerns serious and searching consideration.

To assert that foreign or domestic corporations which have engaged in past questionable conduct are permanently to be denied an opportunity to make amends would not seem to be sound public policy. Such a conclusion would be too stringent in its effects on this transaction and its possible effect on countless others.

It is my belief that the parties to this transaction have taken every reasonable step to remove any improper participants. In addition, the major participants to the Transportation Agreement which underpins this transaction have recently reaffirmed their willingness to carry out this Agreement. Thus, any past conduct in contravention to U.S. policy does not now so infect this transaction, as currently structured, to justify withholding of these loan guarantees.

ANNEX B

ANNEX B

<u>DOCUMENT NO. (AS LISTED ON SCHEDULE A OF RELATOR'S COMPLAINT (A-28-A 29))</u>	<u>UNITED STATES' POSSESSION OF THE DOCUMENT OR THE INFORMA- TION CONTAINED THEREIN PRIOR TO THE COMMENCEMENT OF THIS ACTION</u>	<u>RECORD REFERENCE</u>
1 (A-30-A-46)	Document in possession of Government Operations Committee of the House of Representatives (the "Committee")	Richter Aff. (A-493-495)
	Information in document known to MarAd	Nemirow Aff. ¶ 35 (A-276)
2 (A-47-A-49)	Document is memo of meeting with MarAd officials and of which United States was thus aware	Nemirow Aff. ¶ 36 (A-277)
	Memo identified, described and quoted in <u>New York Times</u> article in Item 6 furnished to Department of Justice	A-158-A-159 Kurimai Aff. (A-496-499)
3 (A-50-A-54)	Document in possession of the Committee	Richter Aff. (A-493-495)
	Information in document known to MarAd	Nemirow Aff. ¶ 35 (A-276)
4 (A-55-A-124)	Document in possession of the Committee	Richter Aff. (A-493-495)
	Document shown to MarAd	Nemirow Aff. ¶ 31 (A-274-275)
5(a) (A-125-A-143)	Document in possession of both the Committee and MarAd	Richter Aff. (A-493-495) Nemirow Aff. ¶ 34 (A-276)

DOCUMENT NO.
(AS LISTED ON
SCHEDULE A OF
RELATOR'S
COMPLAINT
(A-28-A 29))

UNITED STATES' POSSESSION OF
THE DOCUMENT OR THE INFORMA-
TION CONTAINED THEREIN PRIOR
TO THE COMMENCEMENT OF THIS
ACTION

RECORD
REFERENCE

5(b) (A-144-154)	Document in possession of both the Committee and MarAd	Richter Aff. (A-493-495) Nemirow Aff. ¶ 32 (A-275)
6 (A-155-228)	MarAd was aware of virtually all of the American newspaper and magazine articles included in Item 6, as well as some of the foreign articles which essentially contain the same information as the American articles	Nemirow Aff. ¶ 33 (A-276)
	Two <u>New York Times</u> articles included in Item 6 (A-158-161) sent to the Department of Justice by Congressman Aspin	Kurimai Aff. (A-496-499)
7, 8(a) & 8(b) (A-229-262)	Documents have little relevance to issues raised in this action. To the extent of their relevance, the information was furnished to MarAd by Burmah in 1975	Nemirow Aff. ¶ 36 (A-276-277)
	Documents are summarized in Item 5(a) which was in possession of both the Committee and MarAd	Richter Aff. (A-493-495) Nemirow Aff. ¶ 34 (A-276)

ANNEX C

ANNEX C

September 19, 1975
Kurrus and Jacobi
Memorandum

Complaint

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September 16, 1975
Kurrus and Jacobi
Memorandum

Complaint

Paragraph

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September 16, 1975
Kurrus and Jacobi
Memorandum

Complaint

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----- x
UNITED STATES OF AMERICA, :
Plaintiff-Appellee, : AFFIDAVIT OF SERVICE
-against- : 77-6022
THE BURMAH OIL COMPANY LIMITED, :
et al., :
Defendants-Appellees. :
----- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ALLEN CHIU, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to
this action.

2. On the 22nd day of April, 1977, I served the
annexed Brief of Defendants-Appellees upon:

Lipper, Lowey & Dannenberg
747 Third Avenue
New York, New York 10017

Robert B. Fiske, Jr., Esq.
United States Attorney for the
Southern District of New York
One St. Andrew's Plaza
New York, New York

by personally delivering and leaving true and correct copies
thereof at their offices.

Allen Chiu

Allen Chiu

Sworn to before me this
22nd day of April, 1977

Robert F. Belluscio

Notary Public

ROBERT F. BELLUSCIO
Notary Public, State of New York
No. 31-4625331
Qualified in New York County
Commission Expires March 30, 1978

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